

# ARKANSAS SUPREME COURT

No. CR 08-109

DUSTIN LONG  
Petitioner

v.

STATE OF ARKANSAS  
Respondent

Opinion Delivered March 20, 2008

PRO SE MOTION FOR BELATED  
APPEAL AND TO PROCEED *IN*  
*FORMA PAUPERIS* [CIRCUIT  
COURT OF WASHINGTON  
COUNTY, CR 2006-1388, HON.  
WILLIAM A. STOREY, JUDGE]

REMANDED; MOTION TO  
PROCEED *IN FORMA PAUPERIS*  
GRANTED.

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## PER CURIAM

A judgment entered on April 16, 2007, indicates that a jury found petitioner Dustin Long guilty of second-degree sexual assault and sentenced him to 144 months' imprisonment in the Arkansas Department of Correction. The partial record before us contains no notice of appeal, and petitioner brings this pro se motion for belated appeal in which he requests that this court permit his appeal to proceed despite his admission that no notice of appeal was filed within the prescribed thirty-day period. *See* Ark. R. App. P.–Civ. 4(a).

In *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004), this court clarified its treatment of motions for rule on clerk and motions for belated appeal. We said that there are only two possible reasons for an appeal not to be timely, either the party or attorney filing the appeal is at fault or there is good reason. *Id.* at 116, 146 S.W.3d 891. If the party believes there is good reason the appeal was not perfected, the case for good reason can be made in the motion, and this court will decide whether

good reason is present. *Id.* When it is plain from the motion, any affidavits, and record that relief is proper under our rule based upon attorney error or good reason, the relief will be granted. *Id.* at 117, 146 S.W.3d 892.

Here, petitioner contends that he failed to timely file his notice of appeal because of error on the part of his attorney. He claims that he believed that he had no right to appeal the judgment because his attorney, Mr. Jim Rose III, had petitioner sign a letter stating that Mr. Rose did not handle appeals. Petitioner references his attempt to file the notice of appeal in September of 2007, although there is no notice of appeal in the record, and petitioner failed to attach the document referenced to his motion.

In keeping with our practice, Mr. Rose was provided a copy of petitioner's motion and asked to provide an affidavit in response to petitioner's allegations. Mr. Rose has now responded and disputes petitioner's claim concerning his understanding regarding his right to appeal. Mr. Rose does not dispute petitioner's allegation that he obtained a statement from petitioner acknowledging that he was not obligated to pursue an appeal on petitioner's behalf in the case. However, Mr. Rose contends that petitioner was well aware of his right to appeal, that petitioner did not initially wish to appeal, and that petitioner's family actively pursued retaining other counsel for an appeal prior to the action petitioner referenced in September of 2007.

There is no indication in the record that Mr. Rose was relieved by the trial court, and Mr. Rose does not contend that he was relieved. Under Ark. R. App. P.–Crim.16(a), once an attorney represents a defendant, the attorney is obligated to continue representing the defendant until relieved by the appropriate court. *See Hammon v. State*, 347 Ark. 267, 65 S.W.3d 853 (2002). In this situation, where an attorney is not appointed by the court and there has been an agreement that the

retained attorney will not continue in his representation, the better practice is to seek an order of relief that actually terminates the attorney's representation. A motion to relieve counsel would have resolved any issue concerning whether Mr. Rose continued to have an obligation to bring the appeal and at what point that obligation was terminated, and allow the trial court an opportunity to make any further inquiry into the situation that it might deem appropriate.

If Mr. Rose was not relieved, his obligation of representation would continued under Rule 16(a), and the question we would next resolve is whether petitioner waived his right to appeal. This court has held that a defendant may waive the right to appeal by his or her failure to inform counsel of the desire to appeal within the thirty days allowed for filing a timely notice of appeal. *Strom v. State*, 348 Ark. 610, 74 S.W.3d 233 (2002).

Here, petitioner does not contend that he advised Mr. Rose that he wished to appeal, but rather that he had been wrongly advised, to his understanding, that he had no right to appeal. Mr. Rose contends that petitioner was aware that he had a right to appeal and had stated his intention not to appeal. Despite that stated intention, Mr. Rose indicated that he knew that petitioner's family had actively sought other counsel on petitioner's behalf, before petitioner proceeded pro se. Moreover, the judgment indicates on its face that petitioner was informed of his right to appeal the judgment. While petitioner appears to have had an understanding with Mr. Rose that petitioner would pursue an appeal through other means, petitioner was aware of his right to appeal.

The question that remains unresolved is whether the petitioner advised Mr. Rose that he wished to appeal the judgment within thirty days of its entry. Mr. Rose indicates that he consulted with petitioner's wife regarding the merits of the appeal. It is not clear whether Mr. Rose was made aware on petitioner's behalf that petitioner wished to appeal, or whether the consultation was only

with the family concerning their desire to bring an appeal, despite petitioner's alleged intention not to appeal.

Even though petitioner may have sought to appeal with other representation, Mr. Rose continued under an obligation to assist petitioner in his pursuit of an appeal until relieved by the appropriate court, provided petitioner had made him aware of that desire. Mr. Rose would not have been relieved of his obligation to timely file notice of appeal if he were advised of his client's desire to appeal.

We must accordingly remand to the trial court to conduct a hearing to take evidence and provide findings of fact on the issue of whether petitioner advised Mr. Rose of his desire to appeal the judgment within thirty days of the date the judgment was entered. Because the partial record before us does not contain post-judgment motions, we additionally instruct that the trial court provide findings on the issue of whether counsel was relieved and, if so, when that order was entered. Those findings should be provided to this court within ninety days of the date of this order, along with the record of the proceedings.

Finally, petitioner has submitted an affidavit in support of a request that he be allowed to proceed *in forma pauperis*. The motion to proceed *in forma pauperis* is granted.

Remanded; motion to proceed *in forma pauperis* granted.